

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESUS A. IXTA-SALAZAR,

Defendant.

8:08CR326

MEMORANDUM AND ORDER

This matter is before the Court on remand from the Eighth Circuit Court of Appeals (Filing No. 162) and the Defendant's motion for hearing and appointment of counsel.

FACTUAL BACKGROUND

On October 20, 2011, the Court denied the motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence filed by the Defendant, Jesus A. Ixta-Salazar. On January 30, 2012, Ixta-Salazar filed a motion to extend the time for filing a notice of appeal and a request for a certificate of appealability under Federal Rule of Appellate Procedure 4(a)(6). Ixta-Salazar stated that he did not receive the Court's Memorandum and Order or Judgment denying his § 2255 motion under Federal Rule of Civil Procedure 77(d). Because the Court's record reflected that the documents were mailed to Ixta-Salazar's address, the Court denied his motion to extend his appeal deadline. Ixta-Salazar filed a notice of appeal from the order denying his motion to extend the appeal deadline. The Eighth Circuit vacated this Court's order denying his motion to extend the appeal deadline and remanded the case for this Court to consider whether the time to appeal should be reopened under Rule 4(a)(6). Ixta-Salazar then filed a

motion for a hearing and appointment of counsel.

I. Remand; Reopening of Appeal Deadline

Rule 4(a)(6) states:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
- (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
- (C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4.

Ixta-Salazar did not state in his motion to extend the deadline when he received notice of the Memorandum and Order and Judgment denying his § 2255 motion. Because Ixta-Salazar did not move for an extension of his deadline until more than 3 months after the Memorandum and Order and Judgment were entered, the Court assumes that Ixta-Salazar did not receive notice under Rule 77(d) within 21 days of the entry of Judgment.¹ The motion to extend was filed within 180 days of the Memorandum and Order and Judgment. No party will be prejudiced by reopening the time to file an appeal.

¹ The Court notes that its record reflects that the Clerk mailed copies of both the Memorandum and Order and Judgment on October 20, 2011, by mailing copies to the Defendant at his correct institutional address, including his inmate number. Nevertheless, considering Ixta-Salazar's statements in his motion the Court finds that he did not receive timely notice of the documents.

II. Motion for Hearing and Appointment of Counsel

Because Ixta-Salazar's deadline will be extended under Rule 4(a)(6), his request for a hearing is denied as moot. His request for appointment of counsel is denied without prejudice to Ixta-Salazar filing a motion for appointment of counsel in the Eighth Circuit Court of Appeals, once his case is at the Eighth Circuit. Counsel will not be appointed for purposes of preparing a notice of appeal and motion for a certificate of appealability.

Accordingly,

IT IS ORDERED:

1. Ixta-Salazar may file a notice of appeal and a request for a certificate of appealability within 14 days of the date of the filing of this Memorandum and Order;
2. The Defendant's motion for a hearing (Filing No. 164) is denied as moot;
3. The Defendant's motion for appointment of counsel (Filing No. 164) is denied without prejudice to Ixta-Salazar filing a motion for appointment of counsel at the appropriate time in the Eighth Circuit Court of Appeals; and
4. The Clerk is directed to mail a copy of this Memorandum and Order to the Defendant at his last known address.

Dated this 7th day of September, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge